BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35219

224868

PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR DECLARATORY ORDER

COMMENTS OF
THE DOW CHEMICAL COMPANY

The Dow Chemical Company ("Dow") hereby submits comments pursuant to the decision of the Surface Transportation Board ("Board"), served in this docket on March 24, 2009. Dow opposes the Petition for Declaratory Order filed by Union Pacific Railroad Company ("UP") on February 18, 2009 ("UP Petition") as both unnecessary as a matter of public policy and beyond the Board's jurisdiction as a matter of law.

I. INTRODUCTION AND SUMMARY.

A. Identity of Dow.

Dow is a diversified chemical company that harnesses the power of science and technology to constantly improve what is essential to human progress. Dow offers a broad range of innovative products and services to customers in more than 175 countries, helping them to provide everything from fresh water, food and pharmaceuticals to paints, packaging and personal care products. In order to provide many of these essential products and services, Dow both produces and uses hazardous materials, including materials that are classified as toxic inhalation

hazards, or "TIH" materials. The broad range of products that Dow produces span virtually every industry, including railroads, and make possible approximately 90% of the goods people use every day

Dow has developed a culture of safety and responsibility that pervades all of its activities. This culture has generated a long track record of innovation and investment to improve Dow's safety performance in the production, use and transportation of hazardous materials.

Dow recognizes the risks inherent in transporting hazardous materials and is continually designing and re-designing its supply chain to minimize those risks This includes efforts to reduce or eliminate the shipment of highly hazardous materials, continually optimize sourcing and routing of those materials, improve shipping containers, monitor their location and condition in transit, and enable effective emergency preparedness and response. Currently, 20 percent of Dow's 2.2 million product shipments annually are regulated as hazardous materials or dangerous goods. Dow's collaborative efforts with carriers across all transportation modes have achieved an incident-free rate of 99.97 percent and earned it award recognition from Norfolk Southern, CSX, Canadian Pacific, Canadian National and BNSF for leadership and performance in safety practices.

Dow's major manufacturing sites in the United States are located in Texas, Louisiana, Michigan, California and West Virginia These sites, and others around the country, are dependent upon railroads for the safe, secure and reliable transportation of raw materials and products. Dow's business model is built on the fact that rail transportation of hazardous materials represents the safest, most efficient, most economical and most socially acceptable way to transport large volumes of these materials long distances over land.

B. Dow's Interest in This Proceeding.

On February 18, 2009, UP filed a Petition asking the Board to institute this declaratory order proceeding to "clarify" the extent of the common carrier obligation to transport TIH commodities when the requested transportation would displace a TIH source that is closer to the destination. UP's Petition carries the debate over the common carrier obligation to haul TIH commodities beyond the theoretical, and into the practical, by requesting an unprecedented decision that would allow individual railroads, subject to Board scrutiny, to refuse to quote a rate for TIH transportation or to transport a TIH commodity if the railroad concludes that there is a TIH source closer to the destination.

UP's Petition is designed to address many of the same route and sourcing issues that were the subject of the 49 U.S.C. § 333 conference sponsored by the Federal Railroad Administration ("FRA") a little over one year ago. UP Petition at 3.[1] Dow participated in and supported the objectives of the conference. Those efforts have been slow and more complex to coordinate, however, due to the antitrust laws, which according to the Department of Justice, still apply to TIH shippers even though they would not apply to the railroads under Section 333. Consequently, TIH shipper participation has been limited to one-on-one meetings with FRA, outside the presence of other shippers or the railroads. Despite this hurdle, Dow believes that Section 333 conferences are the proper forum in which to address routing and sourcing issues, while preserving economically viable TIH operations in a free marketplace.

Because rail is the most effective, lowest risk over land mode of transport for large volumes of hazardous materials over long distances, the common carrier obligation is integral to the safe transportation of hazardous materials Without the common carrier obligation, many in the rail industry have made it absolutely clear that they would not haul TIH materials at all, and

[1] Because UP's Petition is unnumbered, all citations herein assume that page 1 is the first page of narrative.

might also refuse to haul other categories of hazardous material. The consequences would compromise public safety and the overall public welfare because these hazardous materials either would move by a less safe mode or not at all.

Within the past year, the Board has held two hearings on the common carrier obligation of railroads, including a proceeding focused exclusively upon the transportation of hazardous materials. Ex Parte No. 677 (Sub No. 1), *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*. Dow submitted both written and oral testimony in each proceeding.

Dow does not believe that this Board is the appropriate forum for addressing the issues in UP's Petition, both as a matter of law and sound public policy. Any action by the Board to narrow or eliminate the railroads' common carrier obligation to transport hazardous materials, or even just TIH materials, would have significant consequences that are contrary to the public interest. This concern is magnified by the limited scope of the Board's jurisdiction and expertise to consider the issues presented by UP's Petition. Although UP may believe that its Petition is narrow in scope, the Petition would start the Board down a slippery slope that could extend to all hazardous materials and ultimately to all commodities so long as the railroad can devise some rationale for preferring one movement over another. That result would be the antithesis of the common carrier obligation.

C. Dow's Joint Commitment With UP to Enhance Safety.

Dow has a long-standing relationship with Union Pacific to continually improve the safe and secure transportation of goods. For example, in 1986, Dow and Union Pacific came together with a common goal to extend the safety precautions taken at our plants to the ways that we transport our products The result of their efforts is TRANSCAER®, an acronym for

Transportation Community Awareness and Emergency Response, a voluntary national outreach effort that trains more than 20,000 people annually to prepare for and respond to emergencies in the unlikely event of a chemical transportation incident in their local communities. The effort has grown into a national consortium of chemical manufacturers, transportation companies and related associations working together as the National TRANSCAER Task Group (NTTG). In 2006, Dow and Union Pacific entered into a public commitment which is attached and further described in Section IV.B.2 of this document.

Dow shares UP's commitment to improving the safety and security of transporting hazardous materials by rail, including the objective to promote optimum sourcing and routing of TIH materials. UP's Petition, however, is an inappropriate mechanism for accomplishing this objective because its focus solely upon the length of haul fails to apply a holistic approach to balance both safety and economic issues; it requires the Board and/or the railroad industry to "second-guess" the management decisions of non-railroad industries on non-transportation issues over which they lack the requisite knowledge and expertise, and it requires the Board to address safety and security matters that are beyond its jurisdiction.

II. THE BOARD LACKS JURISDICTION TO GRANT UP'S PETITION.

The Board does not have jurisdiction to entertain UP's Petition, which is based solely upon safety arguments. Specifically, UP contends that the common carrier obligation counteracts the safety and security efforts of FRA and the Transportation Security Administration ("TSA"). UP Petition at 4. The Board's role in safety and security matters, however, is extremely limited. Moreover, Congress has limited the Board's authority to narrow the common carrier obligation to granting exemptions to transportation that satisfy the requirements of 49 U.S.C. § 10502(a).

A. UP's Petition Exceeds the Board's Limited Safety Jurisdiction.

The Board fulfills its responsibility with respect to safety questions when it determines that all Department of Transportation ("DOT") requirements have been satisfied. *See Radioactive Materials, Missouri-Kansas-Texas R.R. Co.*, 357 I.C.C. 458, 463-44 (1977) (adopting by analogy this principle of regulatory responsibility expressed in *Delta Air Lines, Inc. v. C.A B.*, 543 F. 2d 247, 260 (D.C. Cir. 1976) ("*CAB*")) ("*MKT*"). In general, the Board should defer to its sister agencies' positions on safety and security as establishing both an inner and outer limit on its jurisdiction over the same matters. *CAB* at 260. These principles are strongest when there is a need for extensive technical expertise in determining safety standards and a need for uniform standards. *MKT* at 464. Because UP's Petition is not necessary to satisfy any DOT or TSA safety or security requirement, there is no basis for the Board to act.

"[A] carrier may not ask the [Board] to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT. .regulations governing such transport, and these regulations have been met." *Akron, Canton & Youngstown R R Co v. ICC*, 611 F. 2d 1162, 1169 (6th Cir. 1979) ("*Akron*"). *See also, U.S Dept of Energy v The B&O R R Co* , 364 I.C C. 951, 959 (1981) ("*DOE*") (a railroad may not "renege on its common carrier commitment" by claiming a commodity is too dangerous to handle when DOT safety requirements are satisfied); *Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70, 73 (1978). Because UP's Petition would abolish the common carrier obligation to transport a TIH commodity from a more distant origin when there is an alternate TIH source closer to the destination, it amounts to a claim that TIH movements in those circumstances are too dangerous

to haul.[2] But, UP has not alleged that it cannot transport TIH commodities in compliance with DOT or TSA regulations when there may be an alternative TIH source closer to the destination. Thus, UP's Petition does not raise any matter that is within the Board's jurisdiction to address.

Furthermore, where DOT and TSA have established complete and comprehensive safety and security standards for TIH transportation that balance the cost of safety and security with the need for economy, there is a heavy presumption that additional safety and security measures are unreasonable. *See Consolidated Rail Corp. v. ICC*, 646 F. 2d 642, 650 (D.C. Cir. 1981) ("*Conrail*") UP's attempt to abolish its common carrier obligation to transport a TIH from a more distant origin when there is an alternate TIH source closer to the destination is not an additional safety standard. But, even if it were considered to be a safety standard, UP has not attempted to carry its heavy burden. Absent any evidence and argument by UP that existing DOT and TSA regulations are unsatisfactory or inadequate, and in view of express denials by FRA and PHMSA of any need or intent to modify the common carrier obligation in order to comply with their regulations (*see* p. 15), the Board must consider those regulations to embody the appropriate balance between safety and security considerations and the public need for the transportation of TIH commodities *Id* at 651-52.

B. The Board May Only Abolish the Common Carrier Obligation Through the Exemption Statute.

A common carrier railroad must transport all goods delivered to it for transportation upon reasonable request. *Akron* at 1166; 49 U.S.C § 11101(a). The only means provided by Congress for a blanket elimination of the common carrier obligation, as requested by UP, is to

[2] *See e g Classification Ratings of Chemicals, Conrail*, 3 I C C 2d 331, 337 (1986) (characterizing Conrail's insistence upon special train service for radioactive materials as a contention that the commodity is too dangerous to haul under any other circumstances).

obtain an exemption pursuant to 49 U.S.C. § 10502(a). UP's failure to pursue this remedy is fatal to its Petition

In *Classification Ratings on Chemicals, Conrail*, 3 I.C.C. 2d 331, 338 (1986), the ICC held that an attempt to flag out of a tariff for the transportation of TIH commodities was an impermissible end-run around the exemption statute:

> *Once a reasonable request for transportation of these chemicals is* made, Conrail has a common carrier obligation to transport them. It necessarily follows that Conrail's attempt to unilaterally excuse itself from this requirement circumvents section 10505 [currently codified at 10502].

UP's Petition constitutes a similar attempt to flag out of the common carrier obligation to publish rates for the transportation of TIH commodities whenever there may be an alternative TIH source closer to the destination. Thus, this ICC precedent squarely applies in this proceeding.

UP may not use this declaratory order proceeding to avoid its common carrier obligation. Although Congress gave the Board authority to consider UP's request, it did so only within the narrow confines of the exemption standards. The Board, therefore, cannot grant UP's Petition for Declaratory Order.

C. The Duty to Quote a Common Carrier Rate is Absolute and Unqualified.

UP's Petition requests clarification as to whether it must quote a common carrier rate for TIH transportation when there is a TIH source closer to the destination. The duty to quote a common carrier rate is imposed by 49 U.S C. § 11101(b), which requires a carrier to provide a rate "on request." Unlike the common carrier duty in 49 U.S.C. § 11101(a) to provide service "on reasonable request," there is no qualification to the duty to publish rates. Both the Board and the Courts recognize this duty as absolute.

The Board has adopted regulations to enforce Section 11101(b) at 49 C.F.R. 1300.3:

> Where a shipper ..requests that the carrier establish a rate in the absence of an existing rate for particular transportation, the carrier *must promptly* establish and provide to the requester a rate and applicable service terms. [emphasis added]

There is no qualification that limits a railroad's duty to provide a common carrier rate, because a rate request, although an essential predicate to obtaining common carrier service, is not the same as a request for transportation service. "Without rates, and any attendant terms setting forth the particulars of service, a shipper cannot make a specific service request." *Pejepscot Industrial Park, Inc d/b/a Grimmel Industries—Petition for Declaratory Order*, STB Finance Docket No. 33989, slip op. at 8 (served May 15, 2003). Thus, according to the Board, "[i]t is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request." *Id*

In *Akron*, the Sixth Circuit distinguished an order to publish rates from an order to carry goods. *Akron*, 611 F 2d at 1164 & 1166. The Court affirmed the ICC's determination that a railroad may seek approval of stricter safety standards than those imposed by DOT, if shown to be just and reasonable *Id* at1169. However, whether or not a stricter safety standard is reasonable is a matter "properly to be explored *after* the publication of tariffs .., not in deciding whether such publication should be ordered." *Id.* at 1170 [emphasis added].

UP's Petition overlooks this fundamental tenet, by failing to note the distinction between a request for rates and a request for service. UP has an absolute and unqualified duty, under 49 U.S.C. § 11101(b), to quote a common carrier rate. UP may not invoke the "reasonableness" qualification applicable to a request for service, under 49 U.S.C. § 11101(a), to avoid quoting a common carrier rate.

III. NEITHER RAILROADS NOR THE BOARD POSSESS THE KNOWLEDGE OR EXPERTISE TO MAKE THE JUDGMENTS REQUIRED BY UP'S PETITION.

Granting UP's Petition would require the Board to review railroad economic resource allocation decisions and product design, for non-railroad industries, that are far beyond either the railroads' or the Board's knowledge and expertise Moreover, such market allocation decisions are contrary to the free-market foundations of our nation's economy and the antitrust laws UP's Petition would erect barriers to entry and the free flow of commerce by empowering either individual rail carriers or the Board to decide who can and cannot compete in particular markets. The implications of this are staggering.

The administrative burdens would rival those that the Board deemed wise to avoid when it eliminated product and geographic competition from its market dominance determinations in rail rate cases. In *Market Dominance Determinations—Product and Geographic Competition*, 3 S.T.B. 937, 947 (1998), the Board expressed concern that product and geographic competition arguments "have required us to address complex non-transportation issues...requir[ing] us to 'second-guess' shipper management...[and].. delve deeply into industrial operations that are far removed from the transportation industries that we regulate." *See also, Market Dominance Determinations – Product and Geographic Competition*, 5 S.T.B. 492, 493 (2001), *aff'd by Association of American Railroads v STB*, 306 F. 2d 1108 (D.C. Cir. 2002). These concerns apply to an even greater extent to UP's Petition, which raises issues that are very similar to geographic competition.

If railroads are granted any leeway to decide for themselves when the common carrier obligation applies to a TIH movement and when it does not, the Board will find itself enmeshed in the review of innumerable cases where common carrier rail service has been denied. Such review will not be limited to a simple determination of whether there is a sufficient supply of

TIH closer to the destination. The Board also will have to decide whether the shorter route from the closer supply source is in fact the safest and most secure route, despite the shorter distance; whether the alternate supply is committed to other customers; whether that supply is the correct specification for the end-user; whether the price differential between the closer and more distant suppliers is reasonable; whether the seller will have any market for its TIH production at all, if all end-user markets have nearer supply sources; whether the closer source can supply all of the end-user's requirements; and so on, *ad infinitum*. The management decisions of TIH producers will be second-guessed first by railroads, and then by the Board, to an extent that UP itself may not even realize.

Once the Board heads down this road, there is no logical stopping point. For example, railroads already have questioned the reasonableness of transporting a TIH commodity, if there are less hazardous substitute products available. This undoubtedly would be the next petition for declaratory order, and would further insert the Board into businesses where it has no expertise or jurisdiction.

Furthermore, many TIH shippers, faced with a potentially complex, costly, and lengthy battle just to be quoted a tariff rate, would abandon this quest altogether. They would have no desire or incentive to pursue the matter, and their customers, who have an immediate need for their product, would be unwilling or unable to wait for a Board determination that could take over a year after conducting the extensive discovery that would be required, filing 2-3 rounds of evidence, and then waiting for a Board decision.

In short, the Board cannot and should not be making the kinds of decisions required by UP's Petition. It lacks the resources and expertise, not to mention the jurisdiction, to make the regulatory and market resource allocations that would be required.

IV. THERE IS NO NEED FOR THE BOARD TO POLICE TIH SHIPPERS.

UP's Petition is predicated upon an implied need for either the Board or the rail industry to police TIH shippers to ensure that all TIH shipments are necessary and travel the shortest distance possible. But neither the facts behind the specific TIH movements underlying UP's Petition nor broader evidence of the safety-oriented focus of TIH shippers supports this predicate. Furthermore, a long string of both regulatory and private industry initiatives has greatly enhanced the safety and security of rail transportation of TIH commodities

A. The Facts Presented In UP's Petition Are Incomplete.

UP's Petition arises from a single set of facts involving a request for common carrier rates made by US Magnesium ("USM") for transportation of chlorine from Rowley, UT to Houston, TX; Dallas, TX; Allemania, LA; and Plaquemine, LA. Because UP contends that each of these destinations has ample sources of chlorine available from closer origins, it refused to quote rates on these movements to USM. From this single set of facts, UP asks for a broad-based "clarification" of its common carrier obligation to haul all TIH commodities whenever a railroad determines that there is an alternate TIH source closer to the destination.

Both the Chlorine Institute and USM have filed comments that challenge UP's factual assertions and supplement them with many important additional facts. The Chlorine Institute has filed a reply ("CI Reply") which asserts that there is not an "ample supply" of chlorine in the Gulf Region to meet local demand. CI Reply at 3-4. In addition, CI notes that Gulf Region users must have access to alternate sources of chlorine to meet unforeseen contingencies such as weather disruptions and plant outages. *Id* at 4.

USM points out that it is a magnesium producer, and chlorine is a co-product that USM disposes by selling into markets where there is a demand for chlorine. USM Reply at 2-3. If

USM could not sell this chlorine, it would have to vent the chlorine into the atmosphere, which is detrimental to the environment and subject to clean air permit restrictions. *Id* at 3. USM asked UP for common carrier rates only when it was unable to renegotiate an acceptable contract with UP. *Id.* at 4-5. USM needs rates from UP so that USM is assured of buyers for its chlorine co-product. *Id.* at 10. USM states that, if it cannot move its chlorine co-product, it cannot produce magnesium *Id.* at 3.

In addition to the supplemental facts provided by the Chlorine Institute and USM, there are other considerations that are relevant to whether there in fact are alternative TIH sources. For example, chlorine is not the homogenous commodity that UP's Petition assumes. Moisture content can be an important factor, especially for some industrial users. Excessive moisture content can cause corrosion, fouling and plugging of equipment that creates safety issues within a plant due to a build-up of pressure. It costs millions of dollars to build the infrastructure that is required to dry chlorine and not all chlorine producers have this infrastructure. Therefore, an industrial chlorine user may need to qualify the chlorine it purchases to ensure that it meets that user's required specifications. If not, the user must purchase from another source, which may not be the closest source. Moreover, in order to ensure an adequate and uninterrupted supply of chlorine, a single user may purchase chlorine from multiple sources, each of which must be pre-qualified to the requisite specifications.

These are all critical factors that cannot be ignored in order to focus solely upon distance. Moreover, these factors show that USM is not a "bad actor," which places its own economic self-interest above that of the public. Thus, UP has not demonstrated any need, even within the narrow facts of its Petition, for Board action.

B. There is Broad Cooperation Between Railroads and TIH Shippers to Minimize Transportation Risks.

The transportation of hazardous materials is very safe and there are extensive regulatory and private initiatives underway to further enhance safety and reduce risk. These public and private safety initiatives do not require the Board to address safety through restrictions upon the common carrier obligation

1. Regulatory Safety and Security Initiatives.

The Pipeline and Hazardous Materials Safety Administration ("PHMSA") and FRA are the two federal agencies with paramount jurisdiction over rail safety matters. In addition, TSA has jurisdiction over rail transportation security. All three agencies either have concluded or are currently conducting rulemakings directed to the safety and security of transporting hazardous materials by rail.

PHMSA and FRA have promulgated final rules that incorporate the Recommendations of the 9/11 Commission Act of 2007 (Pub. L. 110-53) regarding safety and security measures for the transport of hazardous materials by rail. 73 Fed. Reg. 72182 (Nov. 26, 2008). The rule revises the Hazardous Materials Regulations ("HMR") to require carriers to compile data regarding hazardous commodities transported and routing for such commodities. The carriers then are required to utilize the accumulated data to assess potential safety and security risks and to propose additional alternative routing that is economically practical. Thus, routing issues already are being addressed by PHMSA and FRA.

PHMSA and FRA have initiated a rulemaking that would adopt new tank car safety standards to address tank car structural integrity. 73 Fed. Reg. 17817 (April 1, 2008). The rules create new requirements for tank car construction that increases puncture resistance on tank car shells and heads while increasing the maximum allowable weight for tank cars to accommodate

the increased weight imposed by the new construction requirements. As an interim measure, PHMSA and FRA have adopted enhanced tank car standards for all new cars produced after March 15, 2009 and imposed maximum speed limits for trains carrying TIH materials at 50 miles per hour 74 Fed. Reg. 1770 (Jan. 13, 2009). These measures reduce the risk of a TIH release in the event an accident occurs.

FRA has amended its railroad operating rules and practices to address the problem of human error as a primary factor in railroad accidents 73 Fed. Reg. 8442 (Feb. 13, 2008) The rules require railroads to qualify testing officers who will be charged with conducting safety tests and inspections. They also require railroads to conduct at least a minimum number of tests per year and require a qualified inspector to conduct quarterly reviews to determine trends regarding the rules most often violated as well as relationships between rules that have been violated and accidents or incidents The rules also allow employees to make good faith challenges when requested to perform actions that violate operating rules and require enhanced communication in the form of pre-work job briefings prior to engaging in certain tasks such as pushing and shoving and hand operated cross over switches.

TSA recently adopted rules to address the security risks associated with the shipment of TIH materials 73 Fed. Reg. 72130 (Nov. 26, 2008). The rules augment and compliment PHMSA's regulatory regime by requiring hazardous materials shippers to conduct inspections prior to tendering a shipment to the carrier. The rules also provide chain of custody requirements, which include monitored and protected transfer locations and documented transfers for TIH shipments. Similarly, the rules require on-demand location reporting in high threat urban areas ("HTUAs") to allow for quick response in the event that an incident occurs.

None of the federal agencies responsible for these safety and security initiatives claims that the common carrier obligation of railroads is a hindrance to carrying out their statutory responsibilities to ensure a safe and secure rail network for the transportation of hazardous materials, including TIH commodities. In fact, both FRA and PHMSA have expressly disavowed any such need. PHMSA's rulemaking decision on routing and risk assessment states that "We do not intend for the provisions of this rule to impede the everyday commerce of hazardous materials, or to change the common carrier obligation of railroads to handle security-sensitive materials that shippers tender to them for shipment." 73 Fed. Reg. 72182, 72190 (Nov. 26, 2008). In testimony before the Board in Ex Parte No. 677 (Sub No. 1), FRA declared that "there is no reason to change this common carrier obligation." Testimony of Clifford Eby, Deputy Federal Railroad Administrator, pp. 1-2. Thus, there is no evidence that the common carrier obligation "counteracts" these government efforts. UP Petition at 4.

2. Private Industry Safety and Security Initiatives.

In addition to the minimum measures required by federal regulations for the safe transport of hazardous materials by rail, Dow, along with other TIH shippers, is proactively engaged in multiple projects, both on its own and with various stakeholders in hazardous materials transportation, including railroads, tank car builders, and the local communities through which hazardous materials are transported, to enhance safety and reduce risks.

Notably, Dow has partnered with UP, which is Dow's largest rail carrier, to achieve the following eight goals over a ten year period that began in 2007:

1 Expand the TRANSCAER® program to provide improved community awareness and emergency preparedness along highly hazardous material transportation routes.

2. Improve shipment visibility through continuous surveillance of highly hazardous material shipments by installing GPS and sensor technologies on tank cars and reducing the time those cars are unattended in transit.

3. Develop the Next Generation Rail Tank Car that will achieve a step-change (5-10X) improvement in safety and security over existing designs.

4. Improve supply chain design by reducing the shipment of highly hazardous materials by 50%, while continuing to meet the needs of the marketplace and reducing overall risk.

5. Eliminate non-accidental releases.

6. Deploy positive train control that can stop a train before an accident occurs.

7. Reduce the non-essential dwell time of highly hazardous materials in high threat urban areas by 50%.

8. Improve accident prevention by achieving a 50% improvement in hazardous material rail operations safety.

Dow and UP recently issued a report card on their progress titled "OnTrack to Increase Rail Safety and Security." Dow is attaching a copy of the OnTrack report as Exhibit "A." This report details the actions taken and the substantial progress that Dow and UP have made just two years into the ten year implementation period. Although the OnTrack report illustrates the cooperative efforts between Dow and UP, they are by no means the only companies undertaking such efforts, and indeed many of the projects within the scope of the OnTrack report include other TIH shippers. As a whole, TIH shippers take their safety and security responsibilities very seriously, with many going above and beyond the minimum regulatory requirements. Consequently, there is no need for the Board to take action by narrowing the common carrier obligation as UP has requested.

Respectfully submitted,

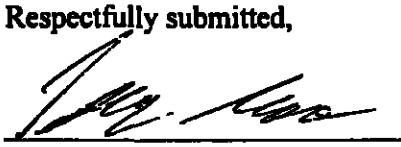

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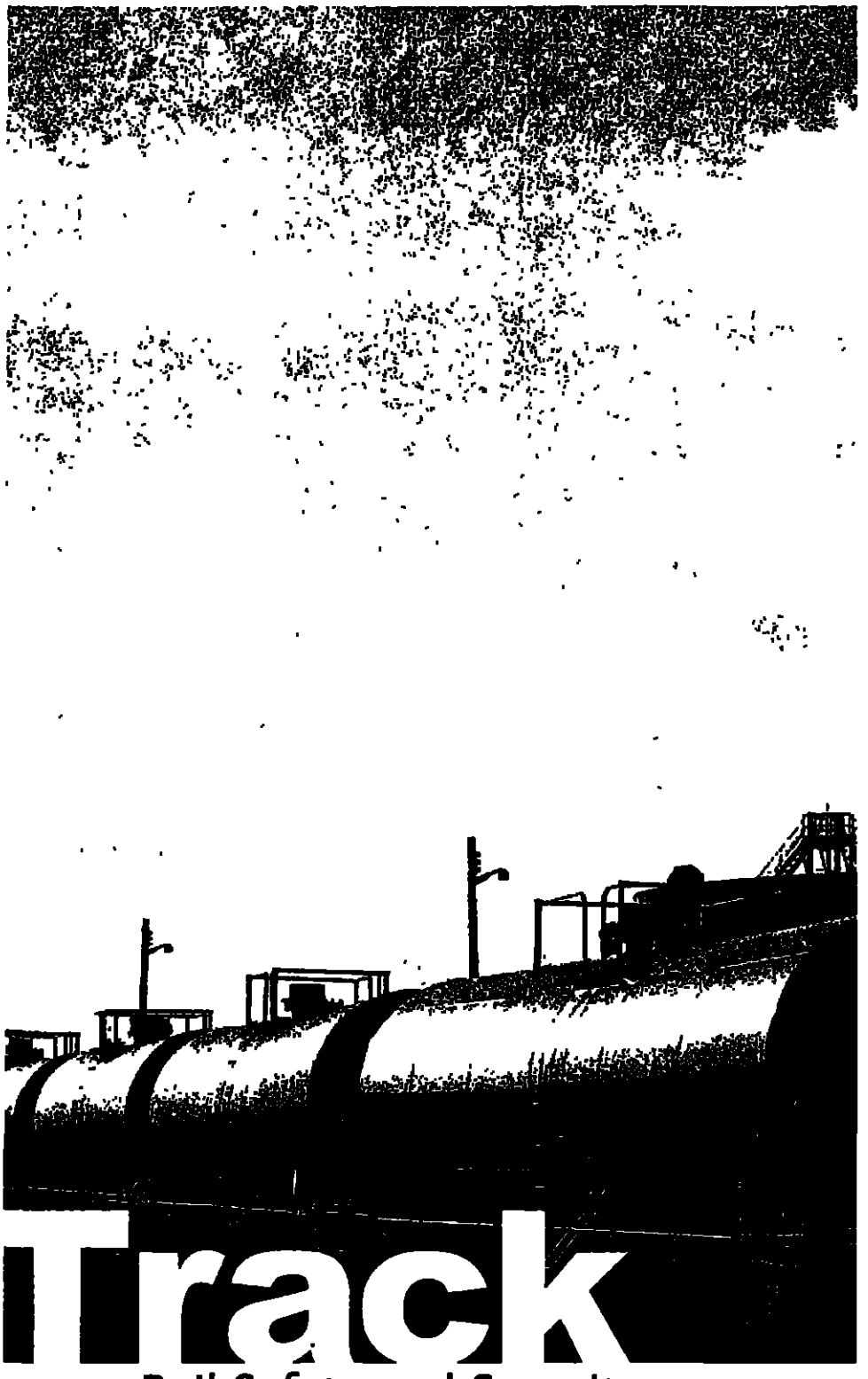
Exhibit A

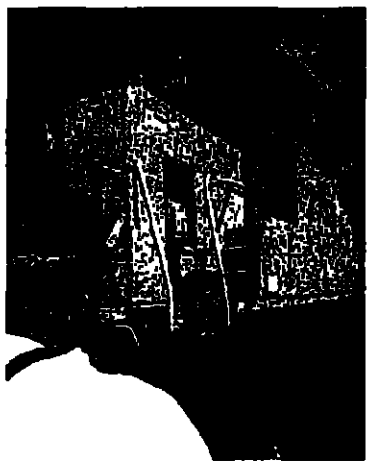


OnTrack

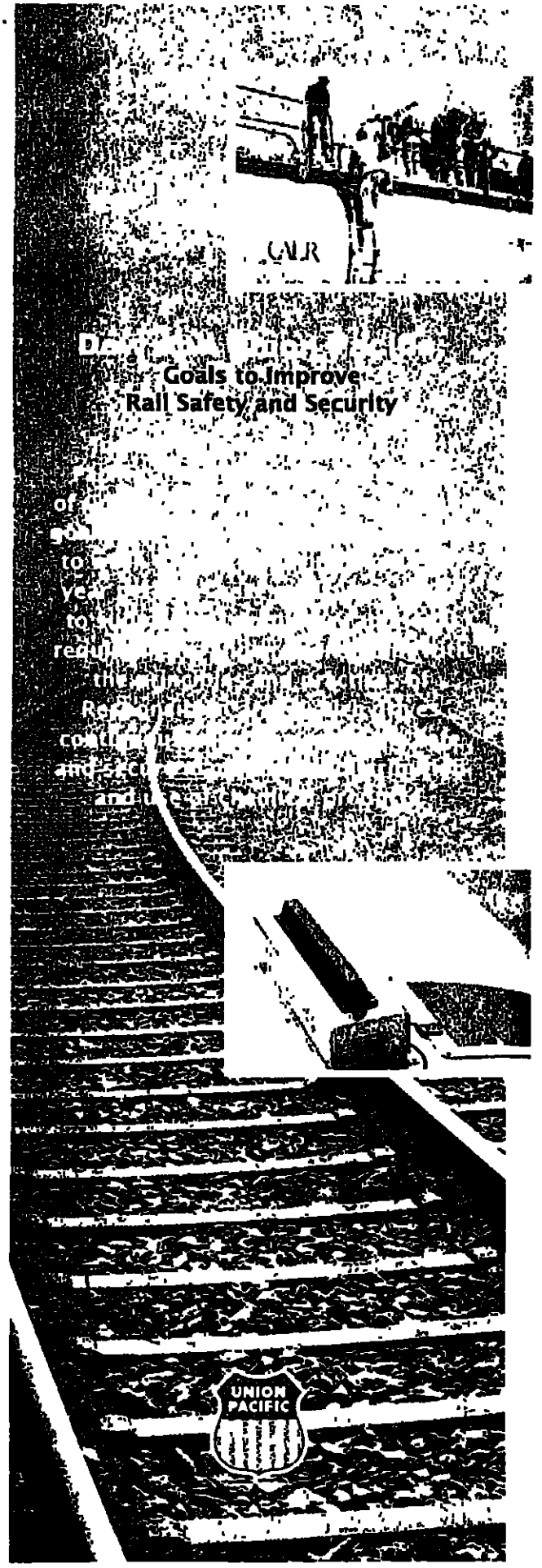
to Increase Rail Safety and Security

OnTrack
to Increase Rail Safety and Security

Every day, Americans use millions of commercial products that make their lives better and keep their families healthier Many of those products - everything from personal care products and food packaging to electronics and clothing - are formulated using raw materials and chemicals that can be hazardous if released during transport So how are we ensuring both the security of these materials shipped via the railways and the safety for the communities that line the thousands of miles of rail across the U S ?



The Dow Chemical Company, together with Union Pacific Railroad, are working together to meet this challenge every day, through innovative solutions that range from industry wide railway crossing safety initiatives and Global Positioning System (GPS) sensors that track railcar movements to designing the next generation of rail tank cars The following pages outline the progress made on each goal through the end of 2008



Goals to Improve Rail Safety and Security

GOAL 1 — Expand the TRANSCAER® Program

By 2012, provide improved community awareness and emergency preparedness along highly hazardous material* transportation routes by providing communities with a significantly enhanced outreach, education and training initiative in coordination with national, regional and state TRANSCAER programs

Progress:

- Dow joined forces with the Fire Fighters Education and Training Foundation and Union Tank Car Company to build a six car, state-of-the-art Hazmat Safety Train for use in providing hands-on training for local community emergency responders across the country. The train was dedicated in memory of Chicago Fire Chief John Eversole on May 5, 2008
- Dow and Union Pacific deployed the Safety Train to provide training for more than 2,000 emergency responders in 28 cities in 2007 and 2008, spanning one-third of Dow's rail transportation routes in North America for highly hazardous materials
- The Safety Train and trainers supported regional hazmat safety conferences in California, Texas and Louisiana.
- The Dow/Union Pacific initiative earned the TRANSCAER National Achievement Award in recognition of the extraordinary results achieved

In addition to the joint Dow/Union Pacific initiative, Union Pacific has continued to work with other shippers and railroads to deliver high quality training for thousands of additional local community emergency responders each year

GOAL 2 — Improve Shipment Visibility

By 2010, provide improved safety, security and emergency response through continuous surveillance of highly hazardous material shipments by installing GPS units and appropriate sensor technologies on all highly hazardous material tank cars, supporting a reduction in the time these cars are unattended in transit

Progress:

- Dow installed GPS sensors on its rail tank cars used to transport Toxic Inhalation Hazard (TIH) materials in order to provide 24/7 visibility of the location and condition of those cars.
- This full-scale, leading-edge technology deployment helped identify tracking equipment vulnerability and reliability issues that have been successfully resolved through Generation 2 and 3 design improvements
- Dow is collaborating with CHEMTREC® and the U S Transportation Security Administration to conduct separate demonstration projects to show how GPS tracking technology can help those organizations achieve enhanced emergency response capabilities for accidents and security threats, respectively

*As used in this document, the term "highly hazardous material" refers to chemicals that are classified as Toxic Inhalation Hazard (TIH) materials or flammable gases

GOAL 3

Develop the Next Generation Rail Tank Car

By 2017, develop and implement a new rail tank car design for the transportation of highly hazardous materials, achieving a step change (5-10X) improvement in safety and security performance over existing fleets

Progress:

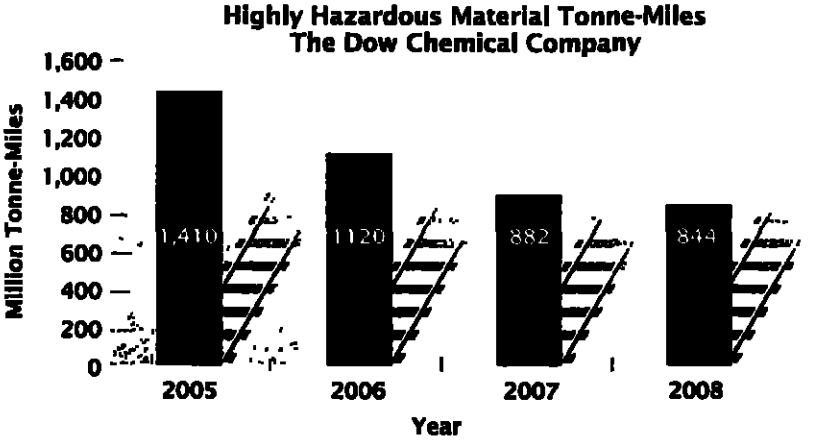
- Dow and Union Pacific joined forces with Union Tank Car Company to lead an aggressive three-year research project (in collaboration with the Federal Railroad Administration, Transport Canada and the U S Transportation Security Administration) to develop new tank car design concepts and technologies that can significantly enhance the safety and security of transporting TIH materials by rail More than 60 people have been engaged on various sub-teams made up of design engineers, university researchers, contractors and specialists in emergency response, rail operations, rail maintenance, research and development, and logistics
- The project team identified and tested new design concepts and technologies that can provide a 200 to 300 percent improvement in crash worthiness for head and side impacts, when compared to today's standard design By comparison, traditional approaches can provide only a 70 to 75 percent improvement
- Further, in collaboration with Midland Manufacturing and members of the Chlorine Tank Car Development Panel, the project team was able to develop and initiate service trials on a new low-profile valve and fitting assembly, featuring fail-safe internal closures, to prevent chemical releases from sheared-off valves and fittings in a rollover
- Through a robust technology transfer program, the project team has significantly advanced the scientific knowledge and the modeling and analytical tools available to tank car builders for the design and optimization of advanced tank car protection systems
- At this stage, the Next Generation Rail Tank Car Project is transitioning its work to a broader-based government and private sector initiative that will continue to drive tank car safety and security improvements in the years ahead

OnTrack to Increase Rail Safety and Security

GOAL 4

Improve Supply Chain Design

By 2015, reduce the shipment of highly hazardous materials by 50 percent while continuing to meet the needs of the marketplace and reducing overall risk



Progress:

- Dow's businesses have identified, evaluated and begun to implement long-term sustainable business strategies to further reduce the shipment of highly hazardous materials This has included consideration of various measures such as
  - Avoidance of new, long-term shipments
  - Alternate sourcing to reduce transportation distances through exchanges, swaps, contract manufacturing and purchases
  - Alternate modes of delivery (e g , pipeline vs rail or highway)
  - Facility rationalization and optimization of producer-user operations
  - Business rationalization and higher thresholds for customer selection/qualification
  - Conversion to less hazardous derivatives before shipment
- Dow has achieved a 40 percent reduction in tonne-miles of highly hazardous materials shipped, compared to a 2005 baseline The largest gains have been associated with rationalization of flammable gas manufacturing operations and alternate sourcing of certain TIH materials
- Dow expects to achieve its 50-percent-reduction target by 2013 The greatest gains are expected to be associated with elimination of significant TIH shipments through further optimization of producer-user operations

GOAL 5

Eliminate Non-Accidental Releases

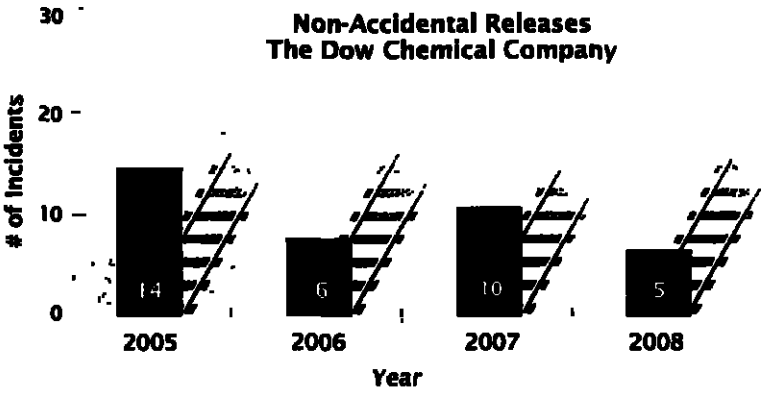
By 2010, drive non-accidental releases of hazardous *materials to zero*

Note A non-accidental release (NAR) is defined as an unintentional release of hazardous material during transportation not caused by an accident or derailment. NARs consist of leaks, splashes and other releases from improperly secured or defective valves, fittings and tank shells, and also include venting from safety relief devices

Progress:

- Dow shipping locations have developed and begun to implement a number of new measures to improve awareness, operator training, incident reporting, follow-up investigation and accountability, and will require post-load pressure and leak detection testing in order to further reduce NARs
- As a result, Dow shipping locations have been able to reduce NARs by 64 percent since 2005 That means that over 99.996 percent of Dow's shipments reach their destination without an NAR
- As part of the railroad industry's continuing effort to eliminate chemical releases from rail tank cars, many of the railroads have established award programs to further increase shipper awareness and recognize those shippers who have taken an instrumental role in preventing NAR incidents Dow has earned the following recognition awards from the nation's Class I railroads since 2006:
  - Norfolk Southern Thoroughbred Chemical Safety Award
  - CSX Chemical Safety Excellence Award
  - Canadian Pacific Chemical Shipper Safety Award
  - Canadian National Safe Handling Award
  - BNSF Stewardship Award

- With a continuing emphasis on operating discipline and accountability, Dow remains firmly committed to its "Drive to Zero," where each employee makes a personal commitment to zero incidents, zero injuries and zero excuses



OnTrack
to Increase Rail Safety and Security

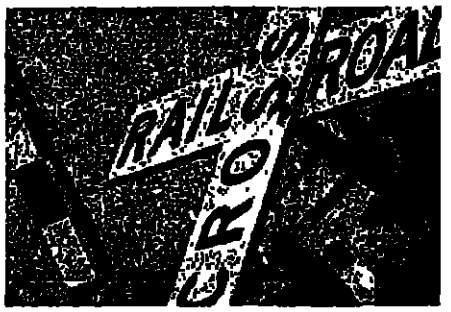
GOAL 6 Deploy Communications Based Train Control/ Anti-Collision System (Positive Train Control)

By 2015 as federally mandated implement technology that will help us eliminate collisions on mainline track pending FRA approvals and the success of pilot projects

Note Positive Train Control (PTC) is a predictive collision avoidance technology that can stop a train before an accident occurs PTC is *designed to keep a train under its maximum speed limit and within* the limits of its authorization to be on a track It will also help prevent train-to-train collisions, over-speed derailments and casualties or injuries to the public and railway workers

Progress:

- Union Pacific began testing PTC technology across 456 miles of track in Iowa, Nebraska, Wyoming, Washington and Idaho – in order to further validate hardware and software technology requirements to implement it across its rail network Once PTC technology proves *safe and reliable, Union Pacific will submit its plans to the FRA* for approval and begin installation. If all goes as planned, implementation would begin in 2010, with completion by 2015 as federally mandated
- In October, Union Pacific announced an Interoperability Standards Agreement with Norfolk Southern, Burlington Northern Santa Fe and CSX Railroads Interoperability is critical since freight and passenger trains share tracks and must be able to exchange and use the same information in order for PTC to function appropriately

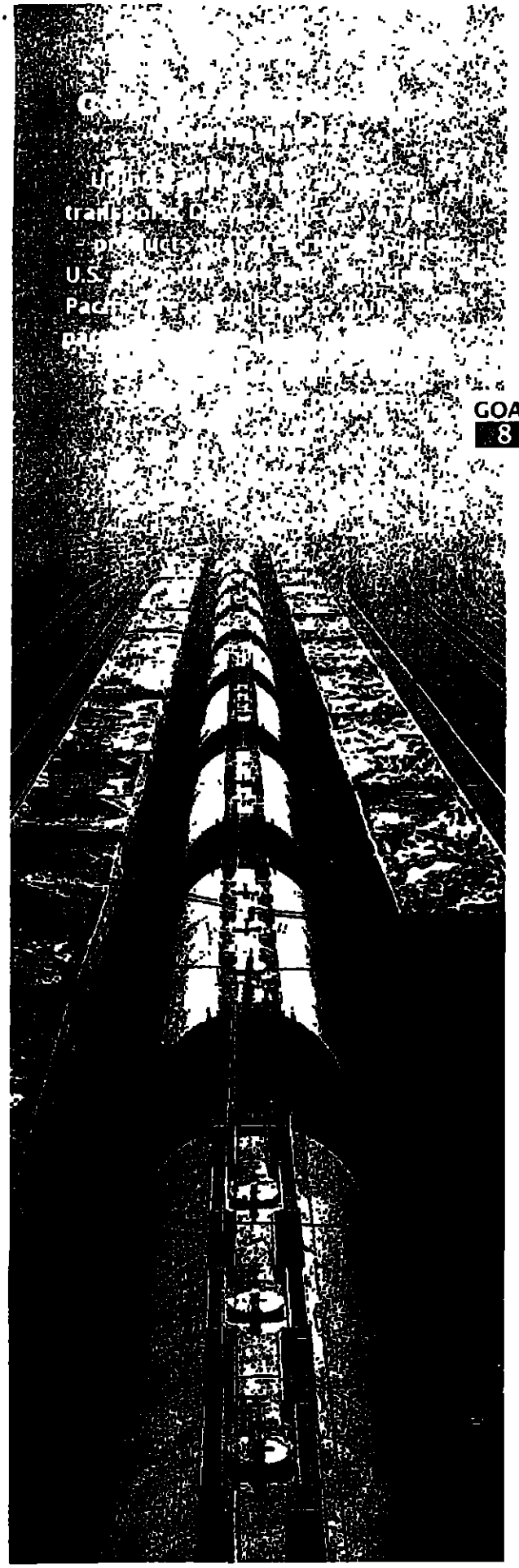


GOAL 7 Reduce Movement in High-Threat Urban Areas (HTUAs)

By 2015, reduce the non essential dwell time of highly hazardous chemical shipments in transit in high threat urban areas by 50 percent

Progress:

- Simultaneously with the MOC goal, Union Pacific and other railroads, in collaboration with the U S Transportation Security Administration, embarked on a new program designed to reduce the risk associated with TIH rail shipments in high-threat urban areas by 50 percent by year-end 2008. Major components of that initiative include.



- Reducing the number of hours (dwell time) TIH cars are held in HTUAs
- Minimizing the occurrence of unattended TIH cars in HTUAs
- Developing site-specific procedures for positive and secure handoff of TIH cars at points of origin, destination and interchange
- Identifying secure storage areas for TIH cars
- Limiting movement of TIH cars near public venues during National Special Security Events

- Through improved tracking and handling practices, Union Pacific has been able to achieve a 60 percent reduction in dwell time in HTUAs, compared to the 2006 baseline

GOAL 8

Improve Accident Prevention

By 2015, achieve a 50 percent improvement in hazardous material rail operations safety

Note The nation's railroads make over one million hazardous material shipments each year, with 99 998 percent of those shipments reaching their destination without an accidental release

Progress:

Union Pacific's accident performance is better than the industry average, and the company remains committed to further continuous improvement, driven by specific initiatives in the following areas:

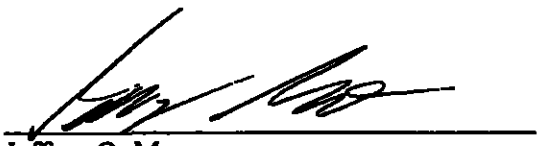
- Risk-based maintenance and operating improvements
- *Targeted employee training, including use of simulators*
- Human-factor incident reduction, including the use of alertness management principles
- Significantly reducing the percentage of highly hazardous material shipments moving in dark territory (i e., on track that is not protected by signal technology)
- Continued emphasis on improving grade crossing safety

As a result of measures and initiatives like those described above, in 2008 Union Pacific was able to achieve a 14 percent improvement in train accidents from 2007, and has had an overall improvement of 26 percent from 2006 Union Pacific remains on track to achieve its 2015 goal

- Implementation of Total Safety Culture (TSC), an employee-led safety program focused on enhancing safety practices while encouraging a culture of concern for not just personal safety but also coworkers' safety

CERTIFICATE OF SERVICE

I, hereby certify that I have served on this 10th day of April, 2009 a copy of the foregoing "Comments of The Dow Chemical Company" by first-class mail on all parties of record in this proceeding.



Jeffrey O. Moreno